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10 UNITED STATES DISTRICT COURT  
11 DISTRICT OF NEVADA  
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13 NATALIE EGBERTO and SARA SMITH ) 3:08-cv-00312-HDM-VPC  
14 individually, jointly and on )  
15 behalf of RICKY EGBERTO, )  
16 ) ORDER  
17 Plaintiff, )  
18 vs. )  
19 E.K. MCDANIEL, individually and )  
20 in his official capacity as )  
21 Warden of the Ely State Prison; )  
22 HOWARD SKOLNIK, individually and )  
23 in his official capacity as )  
24 Director of the Nevada Department )  
25 of Corrections, )  
26 Defendants. )  
27 )  
28 )

22 **I. Statement of Facts<sup>1</sup>**

23 Defendants are E.K. McDaniel and Howard Skolnik of the Nevada  
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25 <sup>1</sup> The facts recounted in this section were drawn from the parties' motions for  
26 summary judgment, oppositions and attached exhibits. See Docket No. 131 Exs. A-P,  
27 PP ; Docket No. 132; Docket No. 134 Exs. A-J; Docket No. 151 Ex. A; Docket No. 153  
28 Exs. 1-31.

1 Department of Corrections ("NDOC"). Defendant E.K. McDaniel is the  
2 Warden of Ely State Prison. Defendant Howard Skolnik is the  
3 Director of the Nevada Department of Corrections.

4 Plaintiffs are Natalie Egberto, Sara Smith and Ricky Egberto.<sup>2</sup>  
5 Plaintiff Natalie Egberto is the wife of Ricky Egberto and mother  
6 of Sara Smith. Plaintiff Sara Smith is the daughter of Natalie and  
7 Ricky Egberto. Plaintiff Ricky Egberto is an inmate committed to  
8 the custody of the NDOC. He is currently serving a life sentence  
9 for murder.

10 On October 19, 2005, plaintiffs Natalie Egberto and Ricky  
11 Egberto had a contact visit in Nevada's Ely State Prison visiting  
12 room. The visit lasted approximately six hours. After the visit,  
13 Natalie Egberto left the prison and Ricky Egberto was escorted back  
14 to his cell. Prior to being escorted back to his cell, Ricky  
15 Egberto received an unclothed body search by correctional officers.  
16 Ricky Egberto's outer body and clothes were examined for  
17 contraband. He was asked to squat and cough while naked, but his  
18 body cavities were not searched. No contraband was discovered  
19 during the body search.

20 Later that day, Ricky Egberto was found unresponsive in his  
21 cell having overdosed on heroin. He received emergency medical  
22 treatment. Two puncture marks were discovered on his arm at the  
23 vein and a bloody piece of toilet paper was found in his hand.

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25 <sup>2</sup> Ricky Egberto's name is also spelled "Rickey Egberto" in some of the  
26 documents and motions associated with this case. The Docket and motions by  
27 plaintiffs use "Ricky", while motions and exhibits filed by defendants use "Rickey".  
28

1 While Ricky Egberto received medical treatment, correctional  
2 officers searched his cell for contraband. The officers found a  
3 syringe, a syringe cap, pieces of cellophane that smelled of feces,  
4 a piece of metal foil with narcotics residue, two pieces of red  
5 balloon, a 3.5 inch locking knife with a serrated blade, and a hand  
6 cuff key.

7 On October 20, 2005, Natalie Egberto returned to the prison  
8 for a scheduled follow-up visit with her husband. After entering  
9 the gate house to Ely State Prison, but prior to entering the  
10 facility, she was stopped by officers from the Nevada Department of  
11 Corrections, the State of Nevada Division of Public Safety, and the  
12 White Pine County Sheriff's Office. Officers escorted her back to  
13 her car, where she consented to a vehicle search. A drug K-9 dog  
14 "Buster" was used to search the outside of Natalie Egberto's  
15 vehicle. "Buster" alerted to the presence of narcotics inside the  
16 vehicle. The entire vehicle was subsequently searched. Officers  
17 seized an overnight bag from the backseat of the vehicle. Inside  
18 the bag were several red balloon tops and a plastic bag containing  
19 a brown substance that field tested positive for heroin. The  
20 Washoe County Sheriff's Office Forensic Science Division later  
21 confirmed the substance was heroin. Many of these items matched  
22 the items found the day before in Ricky Egberto's cell after his  
23 overdose.

24 Based on this evidence, the NDOC Inspector General's Office  
25 concluded that Natalie Egberto was the source of the contraband  
26 found in Ricky Egberto's cell. Warden E.K. McDaniel terminated the  
27 Egbertos' visiting privileges. State criminal charges were filed  
28 against Natalie Egberto relating to the incident, but those charges

1 were eventually dismissed and her criminal record sealed. A prison  
2 disciplinary hearing was held for Ricky Egberto; he was adjudicated  
3 guilty of MJ 26 (possession of contraband) and MJ 53  
4 (possession/sale of intoxicants). MJ 53 is a class A offence and  
5 sanctions are determined on a case by case basis. Because of the  
6 serious nature of the offences and because they involved visitors  
7 to the prison, Ricky Egberto received a two year disciplinary  
8 segregation sentence which included a suspension of his visiting  
9 privileges.

10 Ricky Egberto had been disciplined in 1997 for smuggling  
11 contraband into another Nevada prison. On or about November 9,  
12 1997, a woman named Linda Husky visited Ricky Egberto while he was  
13 housed at Nevada State Prison. Officers had been alerted to a  
14 potential smuggling attempt while monitoring Ricky Egberto's phone  
15 calls. Consequently, Linda Husky was stopped at the prison gate  
16 house and escorted to her vehicle, where she consented to a search.  
17 Balloons containing methamphetamine were discovered in Linda  
18 Husky's trunk. She was taken into custody and transported to the  
19 Carson City Sheriff's Office for further questioning. While there,  
20 she admitted to secreting several balloons containing  
21 methamphetamine in her vagina. This incident resulted in a  
22 sanction for Ricky Egberto and the termination of Linda Husky's  
23 visitation privileges at all NDOC facilities.

24 According to prison records, Ricky Egberto has an extensive  
25 disciplinary history. He began his life sentence in Nevada in  
26 1984. In October 1985, he was transferred to the California  
27 Department of Corrections and Rehabilitation (CDRC) where he  
28 remained for eleven years before being transferred back to Nevada

1 due to management problems he caused. Ricky Egberto was involved  
2 in several incidents while in the custody of the CDRC, including  
3 disobeying orders, fighting (two incidents), manufacturing alcohol  
4 (four incidents), use or possession of drugs or drug paraphernalia  
5 (four incidents), possession of a .22 caliber bullet, and  
6 possession of a shank. In September 1998, he was transferred again  
7 - to the Wyoming Department of Corrections (WDOC). While there he  
8 committed at least ten major disciplinary infractions, including  
9 arson, substance abuse, propelling a substance, possession of  
10 contraband, threats, bullying inmates and correctional staff, and a  
11 major disturbance that necessitated the use of a prison tactical  
12 team. As a result, he was isolated from all other inmates at WDOC  
13 and was eventually returned to Nevada. Since his return to Ely  
14 State Prison, Ricky Egberto has pled guilty or been found guilty of  
15 the following major violations: threats (four incidents);  
16 possession of contraband (six incidents); property damage (two  
17 incidents); drug or alcohol possession or use (five incidents);  
18 organizing a work stoppage or demonstration (two incidents);  
19 battery; possession or use of a recording device; and unauthorized  
20 use of equipment or mail (two incidents). Specifically, in  
21 relation to and since the October 19, 2005 smuggling incident, he  
22 has incurred the following offences and disciplinary sanctions:

- 23 • On 10/19/2005 found guilty of MJ 26 possession of  
24 contraband and sanctioned to 546 days disciplinary  
25 segregation effective 10/26/2005.
- 26 • On 10/19/2005 found guilty of MJ 53 possession of  
27 intoxicants and sanctioned to 730 days disciplinary  
28 segregation effective 4/25/2007.

- 1       •     On 12/08/2006 found guilty of MJ 26 and sanctioned to  
2       disciplinary segregation for 90 days effective 4/24/2009.
- 3       •     On 11/15/2008 found guilty of MJ53 and sanctioned to 18  
4       months of disciplinary segregation and 12 months of loss  
5       of visiting privilege effective 12/24/2008.
- 6       •     On 8/19/2009 found guilty of MJ 53 and sanctioned to 90  
7       days disciplinary segregation effective 10/1/2009.

8 This list is not exhaustive. See Defendants' Mot. Summ. J. Ex. E.  
9 He has been in disciplinary segregation with loss of visiting  
10 privileges almost without interruption from October 2005 to the  
11 present.

12       Ricky Egberto's visiting privileges with Natalie Egberto and  
13 Sara Smith were suspended based on his disciplinary history  
14 beginning in October 2005. Natalie Egberto's visiting privileges  
15 were suspended as a result of the suspension of Ricky Egberto's  
16 privileges and because of her involvement in the October 19, 2005  
17 smuggling incident. In an October 26, 2005 email from Deputy  
18 Director of NDOC Dorothy Holmes to then counsel for plaintiff Ricky  
19 Egberto, Holmes stated that "[i]nmates caught 'dirty' lose in-  
20 person visitation for 2 years." Egberto Mot. Summ. J. Ex. E. In  
21 accordance with prison regulations, Natalie Egberto has petitioned  
22 Warden McDaniel to reinstate her visiting privileges with Ricky  
23 Egberto every six months. *Id.* Exs. H-M. These requests have been  
24 denied consistently. *Id.*

25       Sara Smith is permitted to visit Ely State Prison, but is not  
26 permitted to visit Rickey Egberto. See Docket No. 118. She first  
27 requested visitation with him on June 6, 2005, but, because she was  
28 on another inmate's visitor list at that time, she was denied

1 visitation with Ricky Egberto. She was not eligible for visitation  
2 with Ricky Egberto until after the October 19, 2005 smuggling  
3 incident. After the smuggling incident, Ricky Egberto's visiting  
4 privileges with all visitors were suspended in accordance with  
5 prison policies. Sara Smith requested and was briefly granted a  
6 visit with Ricky Egberto in December 2007, but that request was  
7 later denied because Ricky Egberto was not allowed visitors.  
8 Egberto Mot. Summ. J. Ex. G. Sara Smith has not been suspected of  
9 smuggling contraband into the NDOC, nor has she been implicated in  
10 any wrong doing.

## 11 12 **II. Statement of the Case**

13 On June 19, 2008, plaintiffs filed this action under 42 U.S.C.  
14 § 1983 against the defendants in the United States District Court  
15 for the District of Nevada. Docket No. 6. An amended complaint was  
16 filed on August 29, 2008. Docket No. 9. In their amended  
17 complaint, plaintiffs alleged infringement of their First Amendment  
18 associational rights and deprivation of their Fifth and Fourteenth  
19 Amendment due process and equal protection rights based on the  
20 denial of their visiting privileges with Ricky Egberto since  
21 October 19, 2005. *Id.*

22 On September 29, 2008, defendants filed a motion to dismiss,  
23 Docket No. 11, which this court granted in part and denied in part  
24 on March 25, 2009. See Docket No. 22. The defendants' motion to  
25 dismiss was granted as to plaintiffs' Fifth Amendment claims and  
26 claims for monetary damages against the defendants in their  
27 official capacity, and was denied as to all other claims. *Id.*  
28 Defendants answered the amended complaint denying all causes of

1 action and requests for relief on May 7, 2009. Docket No. 33.

2 Discovery in this case closed on May 25, 2010.

3 Presently before the court is defendants' motion for summary  
4 judgment. Docket No. 134. Plaintiffs have opposed the motion.  
5 Docket No. 153. Also before the court are plaintiffs Natalie and  
6 Ricky Egberto's motion for summary judgment, Docket No. 131, and  
7 plaintiff Sara Smith's motion for summary judgment. Docket No. 132.  
8 Defendants have opposed these motions. Docket No. 152 and Docket  
9 No. 151, respectively.

10 Defendants' motion for summary judgment argues that the  
11 indefinite suspension of plaintiffs' visiting privileges was a  
12 rational response to a suspected security threat, that it is Ricky  
13 Egberto's conduct that prevents him from receiving visitors,  
14 therefore, suspension of plaintiffs' visiting privileges does not  
15 violate the Fourteenth and First Amendments. See Docket No. 134.  
16 They also argue that plaintiff Sara Smith lacks standing to assert  
17 a violation of NDOC Administrative Regulation 707 and the  
18 defendants are entitled to qualified immunity.

19 Plaintiffs Ricky and Natalie Egberto argue in their motion for  
20 summary judgment that their visiting privileges are being  
21 unconstitutionally denied because: (1) NDOC policy, specifically AR  
22 707, mandates reinstatement of visitation after a two year  
23 sanction; (2) NDOC officials indicated that their visiting  
24 privileges would be restored after two years; (3) all formal  
25 criminal charges against Natalie Egberto relating to the October  
26 19, 2005 smuggling incident were dismissed and her criminal record  
27 sealed, thus the smuggling incident is not a valid reason to deny  
28 Natalie Egberto's visiting privileges; (4) Ricky Egberto refused to



1 disclose the source of the contraband and his visiting privileges  
2 are being denied in retaliation; and (5) Ricky Egberto is being  
3 treated differently from similarly situated inmates who have had  
4 their visiting privileges taken away based on similar major  
5 violation offences and then restored pursuant to AR 707. See Docket  
6 No. 131. Plaintiffs assert the denial of their visitation is a  
7 violation of their Fourteenth Amendment due process and equal  
8 protection rights and their First Amendment right of association.

9 Plaintiff Sara Smith's motion for summary judgment argues that  
10 the denial of visitation with Ricky Egberto is irrational because  
11 she has never been suspected of wrong doing and the denial is based  
12 only on her familial relationship to the other plaintiffs. See  
13 Docket No. 132. She argues that this restriction on visitation is  
14 not in keeping with AR 707 and violates her due process rights and  
15 her first amendment right of association. Sara Smith has also  
16 joined in Natalie and Ricky Egberto's motion for summary judgment.  
17 Docket No. 139.

### 18 19 **III. Relevant NDOC Policies**

20 AR 707 governs discipline of inmates. Offences relating to  
21 the introduction, possession and use of drugs or contraband at the  
22 prison subject an inmate to disciplinary segregation and loss of  
23 visiting privileges. Sanctioning an inmate for major violations  
24 (MJ) is done on a case by case basis. AR 707.06. See Def. Opp'n  
25 Egberto Mot. Summ. J. Ex. A. "An inmate may not be subject to the  
26 loss of visiting privileges unless the misconduct relates  
27 specifically to an incident involving visitors or MJ44/53/54  
28 conviction (see 707.12)." AR 707.06 subsection 1.7 (emphasis

1 added). Further, inmates found to have drugs or alcohol in their  
2 systems - specifically in violation of MJ 54 (positive urine test)  
3 and MJ 44 (refusal to test) - will have "NO visits for one calendar  
4 year from the date of the incident [and all visits will then be  
5 non-contact for the second calendar year." See Def. Mot. Summ. J.  
6 Ex. F. AR 707.12 subsection 1.5. "Inmates may request contact  
7 visit restoration following completion of the one (1) year no  
8 visiting period through the grievance process." AR 707.12  
9 subsection 1.6. The reinstatement of no-contact visits after a one  
10 year loss of all visiting privileges appears to be specific to MJ  
11 54 and MJ 44 violations. However, since Class A major violations,  
12 such as MJ 53, are evaluated and sanctions are imposed on a case by  
13 case basis, AR 707.12's visiting sanction could be applied to MJ 53  
14 offences at the discretion of prison officials. Further, when a  
15 violation involves visitors, the decision to take away an inmate's  
16 visiting privileges is discretionary.

17 Prison Operational Procedure (OP) 709, which finds support in  
18 AR 719 and governs visitation procedures at Ely State Prison,  
19 provides that all visits must be approved by the Warden and that  
20 the Warden may suspend visitation up to six (6) months if a visitor  
21 or inmate possess any contraband. Denial and termination of  
22 visitation is documented and reviewed in accordance with AR 719. OP  
23 709 ¶¶ 1, 7.

24 AR 719 provides that "[v]isitation is a privilege for inmates  
25 ... [and v]isiting privileges may be suspended upon orders from the  
26 Warden/designee." AR 719 section III. "Visiting privileges that  
27 have been terminated indefinitely due to ... introduction of  
28 contraband, should be reviewed every six (6) months for re-

1 consideration by the Warden at the written request of the visitor.”  
2 AR 719 section V, F ¶ 4. In addition, AR 719 states that “[n]o  
3 person may be given permission to visit more than one inmate of the  
4 Nevada Department of Prisons [excepting] ... immediate family  
5 members. [Further, a]pproval for a person to change from one  
6 visiting list to another will only be considered if the applicant  
7 has terminated visiting with the original party for a period of at  
8 least one year.” AR 719 section V, A ¶ 8. Decisions regarding  
9 reinstatement of visiting privileges are highly discretionary.<sup>3</sup>

#### 11 **IV. Summary Judgment Standard**

12 Summary judgment “shall be rendered if the pleadings, the  
13 discovery and disclosure materials on file, and any affidavits show  
14 that there is no genuine issue as to any material fact and that the  
15 movant is entitled to judgment as a matter of law.” Fed. R. Civ.  
16 P. 56©. The burden of demonstrating the absence of a genuine issue  
17 of material fact lies with the moving party, and for this purpose,  
18 the material lodged by the moving party must be viewed in the light  
19 most favorable to the nonmoving party. *Adickes v. S.H. Kress &*  
20 *Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles*, 141  
21 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one  
22 that affects the outcome of the litigation and requires a trial to

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24 <sup>3</sup> The prison regulations quoted are those that were in effect at the time of  
25 the October 2005 smuggling incident. See Defendants’ Mot. Summ. J. Ex. F; Opp’n  
26 Egberto Mot. Summ. J. Ex. A. AR 719 was amended in early 2010, however, the  
27 language and substance of the pertinent policies are the same except for re-  
28 numbering of sections and paragraphs. *Id.*

1 resolve the differing versions of the truth. *Lynn v. Sheet Metal*  
2 *Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986); *S.E.C. v.*  
3 *Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

4       Once the moving party presents evidence that would call for  
5 judgment as a matter of law at trial if left uncontroverted, the  
6 respondent must show by specific facts the existence of a genuine  
7 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
8 250 (1986). "[T]here is no issue for trial unless there is  
9 sufficient evidence favoring the nonmoving party for a jury to  
10 return a verdict for that party. If the evidence is merely  
11 colorable, or is not significantly probative, summary judgment may  
12 be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla  
13 of evidence will not do, for a jury is permitted to draw only those  
14 inferences of which the evidence is reasonably susceptible; it may  
15 not resort to speculation." *British Airways Board v. Boeing Co.*,  
16 585 F.2d 946, 952 (9th Cir. 1978); see also *Daubert v. Merrell Dow*  
17 *Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("[I]n the event  
18 the trial court concludes that the scintilla of evidence presented  
19 supporting a position is insufficient to allow a reasonable juror  
20 to conclude that the position more likely than not is true, the  
21 court remains free . . . to grant summary judgment."). Moreover,  
22 "[i]f the factual context makes the non-moving party's claim of a  
23 disputed fact implausible, then that party must come forward with  
24 more persuasive evidence than otherwise would be necessary to show  
25 there is a genuine issue for trial." *Blue Ridge Insurance Co. v.*  
26 *Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998) (citing *Cal.*  
27 *Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*,  
28 818 F.2d 1466, 1468 (9th Cir. 1987)). Conclusory allegations that

1 are unsupported by factual data cannot defeat a motion for summary  
2 judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

3 If the parties file cross-motions for summary judgment, the  
4 court must consider each party's motion separately and determine  
5 whether that party is entitled to a judgment under Rule 56. In  
6 making these determinations, the court must evaluate the evidence  
7 offered in support of each cross-motion. *Fair Housing Council of*  
8 *Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136-37  
9 (9th Cir. 2001).

## 10 11 **V. Analysis**

### 12 A. First Amendment Freedom of Association<sup>4</sup>

13 "[F]reedom of association is among the rights least compatible  
14 with incarceration." *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003).  
15 Some curtailment must be expected in the prison context. *Id.*;  
16 *Gerber v. Hickman*, 291 F.3d 617, 621 (9th Cir. 2002) (loss of  
17 intimate association part and parcel with confinement). Spouses  
18 and family members of prisoners do not have rights or privileges to  
19 visitation distinct from those of the inmate to which they are  
20 married or related. *Hill v. Washington State Dep't of Corrections*,  
21 628 F. Supp. 2d 1250, 1263 (W.D. Wash. 2009); *Harris v. Murray*, 761  
22 F. Supp. 409, 412 (E.D. Va. 1990). Prison regulations that curtail  
23 the right to freedom of association by restricting family visiting  
24 privileges are not necessarily unconstitutional. See *Oxendine v.*  
25 *Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975) (a prisoner has no

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27 <sup>4</sup> All plaintiffs (Sara Smith, Natalie and Ricky Egberto) assert a First  
28 Amendment freedom of association claim.

1 constitutional right to physical contact with his family); *Gerber*,  
2 291 F.3d at 621(right of intimate association is necessarily  
3 abridged in the prison setting); *Dunn v. Castro*, 621 F.3d 1196,  
4 1201 (9th Cir. 2010) (Right to freedom of association is limited in  
5 prison, thus, imposition of prison regulation preventing inmate  
6 from visitation with his children permissible.); *Block v.*  
7 *Rutherford*, 468 U.S. 576, 586, 589 (1984) ("[T]he Constitution does  
8 not require that detainees be allowed contact visits when  
9 responsible, experienced administrators have determined, in their  
10 sound discretion, that such visits will jeopardize the security of  
11 the facility."); *Overton*, 539 U.S. at 129-32(Despite how severely  
12 the prison regulations at issue restricted the prisoners' right to  
13 receive visits from family, they were still constitutional.);  
14 *Samford v. Dretke*, 562 F.3d 674, 682 (5th Cir. 2009) (per curiam)  
15 (holding the removal of prisoner's sons from the approved visitors  
16 list did not violate his constitutional rights); *see also Turner v.*  
17 *Safley*, 482 U.S. 78, 95-96 (1987).

18 A court need not determine the extent to which freedom of  
19 association survives incarceration if the regulation at issue bears  
20 a rational relationship to legitimate penological interests. *See*  
21 *Overton*, 539 U.S. at 132. Great deference must be shown to prison  
22 administrators "in the adoption and execution of policies and  
23 practices that in their judgment are needed to preserve internal  
24 order and discipline and to maintain institutional security." *Hill*,  
25 628 F. Supp. 2d at 1263; *Daniel v. Rolfs*, 29 F. Supp. 2d 1184, 1188  
26 (E.D. Wash. 1998); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). The  
27 courts must not become unnecessarily involved in prison  
28 administration. *Id.*; *see also Procunier v. Martinez*, 416 U.S. 396,

1 405 (1974). Prison officials must have the ability to anticipate  
2 security problems and address such problems as needed. *Id.* Prison  
3 security decisions are "peculiarly within the province and  
4 professional expertise of corrections officials, and, in the  
5 absence of substantial evidence in the record to indicate that  
6 prison officials have exaggerated their response to these  
7 considerations, courts should ordinarily defer to their expert  
8 judgment in such matters." *Pell v. Procunier*, 417 U.S. 817, 827  
9 (1974).

10 The court must consider four factors in deciding whether a  
11 prison regulation affecting a constitutional right that survives  
12 incarceration withstands a constitutional challenge. *Turner*, 482  
13 U.S. at 89. The first factor is whether there is a "valid,  
14 rational connection" between the regulation and a legitimate  
15 government interest. *Id.* The second is whether the inmate has an  
16 alternative means of exercising the allegedly impinged  
17 constitutional right. *Id.* at 90. Third, the court considers the  
18 cost to accommodate the asserted right on guards and other prison  
19 resources. *Id.* Finally, the court considers whether there are  
20 ready alternatives to the challenged regulation. *Id.* The "absence  
21 of ready alternatives is evidence of the reasonableness of a prison  
22 regulation." *Id.*

23 *I. Legitimate Government Interest*

24 Prison officials have a legitimate interest in using their  
25 limited resources to promote internal prison security. Both Ricky  
26 and Natalie Egberto pose a security threat to Nevada's prisons. On  
27 at least two occasions, Ricky Egberto was involved in contraband  
28 and drug smuggling incidents at NDOC facilities: first, in 1997

1 with visitor Linda Husky who attempted to smuggle methamphetamine  
2 into the Nevada State Prison for Ricky Egberto; and second, in  
3 October 2005 with plaintiff Natalie Egberto, who successfully  
4 smuggled in and transferred to Ricky Egberto heroin, a syringe, a  
5 handcuff key, and a knife. Def. Mot. Summ. J. Exs. A, H. That the  
6 outside introduction of contraband and narcotics to the prison  
7 compromises the safety of prison staff and inmates is obvious. The  
8 suspension of the visiting privileges of Ricky and Natalie Egberto  
9 was a valid, rational response to preventing the introduction of  
10 drugs and contraband to the prison. *See Robinson v. Palmer*, 841  
11 F.2d 1151, 1156-57 (D.C. Cir. 1988) (holding that the permanent  
12 denial of face-to-face communications between inmate and his wife  
13 was not an "exaggerated response" to the perceived threat of  
14 visitors introducing drugs into the prison).

15 Based on the record before the court, it appears that Ricky  
16 Egberto is a high risk inmate, who continues to violate prison  
17 rules and has been involved in visitor related smuggling incidents  
18 in the past. Def. Mot. Summ. J. Exs. A-E, H-J. Thus, suspending  
19 his visiting privileges bears a rational relationship to  
20 maintaining prison security. Even though the record shows that  
21 plaintiff Sara Smith has not been involved in any wrong doing and  
22 does not pose a real security threat to the prison, a denial of  
23 Ricky Egberto's visiting privileges necessarily results in the  
24 denial of Sara Smith's privilege to visit him in prison. *See Hill*,  
25 628 F. Supp. 2d at 1263 (family members of prisoners do not have  
26 rights or privileges distinct from those of the inmate to which  
27 they are related); *Harris*, 761 F. Supp. at 412. *See also* Smith Mot.  
28 Summ. J. 4.



1           *ii. Alternative Means of Exercising Right*

2           Plaintiffs have alternative means of exercising the First  
3 Amendment right to association. They may still communicate  
4 regularly with each other through the telephone and traditional  
5 mail. See *Overton*, 539 U.S. at 135 (phone calls and letter writing  
6 are alternatives sufficient enough to support prison regulation  
7 limiting visitations). In addition, plaintiffs may request  
8 reinstatement of their visiting privileges every six months.<sup>5</sup> AR  
9 719 section V, F ¶ 4. "Alternatives to visitation need not be  
10 ideal[, ]...they need only be available." *Overton*, 539 U.S. at 135.

11           *iii. Cost*

12           Accommodation of the plaintiffs' right to association will  
13 overly tax prison resources, which are better allocated elsewhere.  
14 The October 19, 2005 successful smuggling incident makes evident  
15 that extra guards and a more thorough search of Ricky and Natalie  
16 Egberto would be required prior to and after each visit. After his  
17 October 19, 2005 visit with Natalie Egberto, Ricky Egberto  
18 underwent an unclothed body search. Def. Mot. Summ. J. Ex. A.  
19 However, the smuggled contraband and narcotics were successfully  
20 secreted in his body cavities. *Id.* Thus, a more extensive search  
21 of Ricky Egberto's person would be necessary, requiring additional  
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23           <sup>5</sup> On one occasion, Natalie Egberto requested reinstatement of visitation with  
24 Ricky Egberto and was denied in a February 7, 2008 letter from Warden McDaniel,  
25 which stated: "Your request for visitation has been reviewed. Your request is  
26 denied. This issue will not be revisited." Egberto Mot. Summ. J. Ex. L. To the  
27 extent this letter suggests the visitation issue will never be reconsidered, such  
28 a position would be in violation of AR 719.

1 expenditures of resources. Because of Ricky Egberto's extensive  
2 disciplinary history, similar procedure would likely be necessary  
3 after visits with other visitors, such as Sara Smith. *Id.* at Ex. E.  
4 Likewise, Natalie Egberto brought the smuggled contraband and  
5 narcotics to the prison in her car. *Id.* at Ex. A. To ensure such  
6 conduct is not repeated in the future, the prison would need to  
7 allocate manpower and time to thoroughly search Natalie Egberto's  
8 vehicle before each visit with her husband. Thus, if plaintiffs  
9 were allowed to resume visits with Ricky Egberto additional  
10 security precautions at the prison would be necessary.

11 *iv. Absence of Ready Alternatives*

12 Plaintiffs have not suggested an alternative that would fully  
13 accommodate the asserted right while not imposing more than a de  
14 minimis cost to the penological goal of prison security. See  
15 Egberto Mot. Summ. J. 14-15; Smith Mot. Summ. J. 9-11. See also  
16 *Overton*, 539 U.S. 136.

17 The law is clear and the record before the court shows that  
18 there exists no genuine issue of material fact as to plaintiffs'  
19 First Amendment claims. Defendants' motion for summary judgment  
20 should be granted and all plaintiffs' First Amendment claims  
21 dismissed. Consequently, all plaintiffs' motions for summary  
22 judgment should be denied as to their First Amendment claims.

23 B. Fourteenth Amendment Due Process and Equal Protection

24 *I. Due Process<sup>6</sup>*

25 Prisoners "retain [only] those constitutional rights that are  
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27 <sup>6</sup> All plaintiffs (Sara Smith, Natalie and Ricky Egberto) assert a Fourteenth  
28 Amendment due process claim.

1 not inconsistent with their status or with the legitimate  
2 penological objectives of the correctional system." *Edwards v.*  
3 *Carey*, 2008 WL 59155 \*10 (E.D. Cal. Jan. 3, 2008). Whether any  
4 procedural protections under the Fourteenth Amendment are due  
5 depends on the existence of a liberty interest and the extent to  
6 which an individual has suffered a grievous loss of liberty, even  
7 taking into account the nature of imprisonment. See *Morrissey v.*  
8 *Brewer*, 408 U.S. 471, 481 (1972); see also *Edwards*, 2008 WL 59155  
9 \*10 (quoting *Sandin v. Conner*, 515 U.S. 472, 483-4 (1995) (State-  
10 created "'liberty interests which are protected by the Due Process  
11 Clause,' ... are generally limited to freedom from restraint that  
12 'imposes atypical and significant hardship on the inmate in  
13 relation to the ordinary incidents of prison life.'"). Liberty  
14 interests protected by Fourteenth Amendment must be more than "an  
15 abstract need or desire" and based on more than a "unilateral  
16 hope." See *Board of Regents of State Colleges v. Roth*, 408 U.S.  
17 564, 571 (1972); *Connecticut Board of Pardons v. Dumschat*, 452 U.S.  
18 458, 465 (1981). An individual claiming a protected liberty  
19 interest must be legitimately entitled to it. See *Kentucky Dep't*  
20 *Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

21 Certain prison regulations may create liberty interests  
22 protected by the Fourteenth Amendment. *Id.* However, most prison  
23 regulations are designed to guide prison officials in the  
24 administration of the prison, not confer rights on inmates.  
25 *Witherow v. Crawford*, 468 F. Supp. 2d 1253, 1265 (D. Nev. 2006)  
26 (citing *Sandin*, 515 U.S. 472). Further, any prison regulation that  
27 creates a liberty interest must contain "substantive limitations on  
28 official discretion" or "explicit mandatory language." *Kentucky*

1 *Dep't Corrections*, 490 U.S. at 460, 462.

2       The law is clear that inmates do not have a right to  
3 visitation under the Due Process Clause of the Fourteenth  
4 Amendment. *Id.* at 460-1 (denial of prison access to certain  
5 visitors is well within the terms of confinement ordinarily  
6 contemplated in a prison sentence, thus, it is not independently  
7 protected by the Due Process Clause); *Dunn*, 621 F.3d at 1201 (Right  
8 to visitation is limited.); *Overton*, 539 U.S. at 129-32 (Despite  
9 how severely the prison regulations at issue restricted the  
10 prisoners' right to receive visits from family, they were still  
11 constitutional.); see also *Samford*, 562 F.3d at 682 (holding the  
12 removal of prisoner's sons from the approved visitors list did not  
13 violate his constitutional rights); *Wirsching v. Colorado*, 360 F.3d  
14 1191, 1198-1201 (10th Cir. 2004) (upholding prison regulation that  
15 prohibited a prisoner from receiving any visits from his children  
16 so long as he refused to participate in a treatment program); *Ware*  
17 *v. Morrison*, 276 F.3d 385, 388 (8th Cir. 2002) (holding that the  
18 suspension of a prisoner's visitation privileges with his wife did  
19 not violate his due process rights); *Peterson v. Shanks*, 149 F.3d  
20 1140, 1145 (10th Cir. 1998) ("[T]he Supreme Court has held that  
21 inmates have no right to unfettered visitation. Rather, prison  
22 officials necessarily enjoy broad discretion in controlling visitor  
23 access to a prisoner[.]" (internal citation omitted));  
24 *Caraballo-Sandoval v. Honsted*, 35 F.3d 521, 525 (11th Cir. 1994)  
25 ("[I]nmates do not have an absolute right to visitation, such  
26 privileges being subject to the prison authorities' discretion  
27 provided that the visitation policies meet legitimate penological  
28 objectives."); *Robinson*, 841 F.2d at 1156-57 (holding that the

1 permanent denial of face-to-face communications between inmate and  
2 his wife was not an "exaggerated response" to the perceived threat  
3 of visitors introducing drugs into the prison); *Thorne v. Jones*,  
4 765 F.2d 1270, 1273-75 (5th Cir. 1985) (holding prisoner had no  
5 absolute right to visits from his parents); *Harmon v. Auger*, 768  
6 F.2d 270, 272 (8th Cir. 1985) (holding that an inmate does not have  
7 a liberty interest in contact visits); *Smith v. Coughlin*, 748 F.2d  
8 783, 788-89 (2d Cir. 1984) (upholding prison regulation that  
9 prohibited contact visits from family); *Bellamy v. Bradley*, 729  
10 F.2d 416, 420 (6th Cir. 1984) (upholding the termination of family  
11 visits as a result of prison regulation violations); *Ramos v. Lamm*,  
12 639 F.2d 559, 570 n. 26 (10th Cir. 1980); *Lynott v. Henderson*, 610  
13 F.2d 340, 342 (5th Cir. 1980) (holding that "convicted prisoners  
14 have no absolute constitutional right to visitation"); *Inmates of*  
15 *Allegheny County Jail v. Pierce*, 612 F.2d 754, 758-60 (3d Cir.  
16 1979) (holding that prohibition of contact visits from family  
17 members does not violate prisoners' due process rights); *Feeley v.*  
18 *Sampson*, 570 F.2d 364, 372-73 (1st Cir. 1978).

19 In addition, NDOC AR 707 does not contain substantive  
20 predicates or mandatory language that would remove a prison  
21 official's ability to make discretionary decisions regarding prison  
22 visitation policies and create a liberty interest in prison  
23 visiting privileges. *Kentucky Dep't Corrections*, 490 U.S. at 460,  
24 462. See also Opp'n Egberto Mot. Summ. J. Ex. A.

25 The plaintiffs - Natalie Egberto, Ricky Egberto and Sara Smith  
26 - do not have a constitutionally-protected liberty interest in the  
27 restoration of their visiting privileges. AR 707 consistently  
28 defines visitation as a privilege and not a right. Further,

1 although AR 707.12 states that inmates found to have drugs or  
2 alcohol in their systems will have "NO visits for one calendar year  
3 from the date of the incident [and all visits will then be non-  
4 contact for the second calendar year," ultimately, the  
5 reinstatement of visiting privileges is discretionary and subject  
6 to the Warden's review. See AR 707.12; AR 707.06 subsection 1.7  
7 (inmate subject to the loss of visiting privileges if the  
8 misconduct relates to an incident involving visitors or MJ44/53/54  
9 conviction); OP 709 (all visits must be approved by the Warden and  
10 that the Warden may suspend visitation up to six (6) months if a  
11 visitor or inmate possess any contraband); AR 719 section III  
12 ("[v]isitation is a privilege for inmates ... [and v]isiting  
13 privileges may be suspended upon orders from the Warden/designee");  
14 AR 719 section V, F ¶ 4 ("[v]isiting privileges that have been  
15 terminated indefinitely due to ... introduction of contraband,  
16 should be reviewed every six (6) months for re-consideration by the  
17 Warden at the written request of the visitor."). These regulations  
18 are highly discretionary.

19 While the October 26, 2005 email from the Deputy Director of  
20 NDOC Dorothy Holmes may have given the plaintiffs an expectation  
21 that visitation might be restored after two years, an expectation  
22 of a benefit is not enough to generate a liberty interest. See  
23 *Robinson*, 841 F.2d at 1155 (family members of prison who expected  
24 suspension of prisoner's visitation privileges to last only one  
25 year based on letter from department of corrections had no  
26 constitutionally-shielded liberty interest in the restoration of  
27 visiting privileges); *Connecticut Bd. of Pardons*, 452 U.S. at 465  
28 (felon's expectation that his sentence will be commuted is "simply

1 a unilateral hope"); *Meachum v. Fano*, 427 U.S. 215, 228 (1976)  
2 (felon's expectation that he will remain at a particular prison was  
3 too "insubstantial" to invoke due process protections). Thus, such  
4 a denial does not implicate the procedural protections of the due  
5 process clause. *Robinson*, 841 F.2d at 1155.

6 Moreover, as detailed above, when inmates violate prison  
7 regulations, as plaintiff Ricky Egberto has, a typical sanction is  
8 the loss of visiting privileges. Opp'n Egberto Mot. Summ. J. Ex. A.  
9 The denial of plaintiffs' visiting privileges does not impose a  
10 significant hardship, atypical to ordinary prison life on the  
11 plaintiffs. See *Sandin*, 515 U.S. at 483-4; *Kentucky Dep't*  
12 *Corrections*, 490 U.S. at 460-1 (denial of visitors is well within  
13 the terms of confinement); *Gerber*, 291 F.3d at 621 (loss of  
14 intimate association is part and parcel of imprisonment). A Nevada  
15 inmate and prison visitor are never guaranteed visitation, which is  
16 a discretionary privilege and not a right.

17 To the extent that Warden McDaniel's letter dated February 7,  
18 2008 was intended to be a permanent denial of plaintiffs' visiting  
19 privileges, such a denial would not be consistent with NDOC policy.  
20 See Egberto Mot. Summ. J. Ex. L (Letter stated: "Your request for  
21 visitation has been reviewed. Your request is denied. This issue  
22 will not be revisited." (emphasis added)). Under express NDOC  
23 policy, plaintiffs may continue to petition the prison for  
24 reinstatement of their visiting privileges every six months. See AR  
25 719 section V, F ¶ 4.

26 Even if the court found that plaintiffs had a due process  
27 liberty interest in the restoration of their visiting privileges,  
28 the record before the court clearly demonstrates the defendants

1 have been justified in denying their requests for visitation. A  
2 prison regulation or policy that impinges on a prisoner's  
3 constitutional rights (and by extension the rights of their family  
4 members) is still constitutionally valid if it is reasonably  
5 related to legitimate penological interests. *Turner*, 482 U.S. at  
6 89; see also *Hill*, 628 F. Supp. 2d at 1263; *Harris*, 761 F. Supp. at  
7 412. Internal prison security is a legitimate penological  
8 interest. *Block*, 468 U.S. at 589 (that there is a rational  
9 connection between a ban on certain visits and the security of a  
10 prison is obvious). Plaintiff Ricky Egberto is a proven security  
11 risk to the prison. See Defendants' Mot. Summ. J. Exs. E, I. As  
12 outlined above, he has received numerous sanctions for disciplinary  
13 offences, including sanctions for at least two smuggling incidents  
14 - one involving Linda Husky in 1997 and a second involving  
15 plaintiff Natalie Egberto on October 19, 2005. *Id.* at Exs. A-E, H-  
16 I. Likewise, plaintiff Natalie Egberto is a proven security risk  
17 to the prison. *Id.* at Exs. A-C. As outlined above, items  
18 discovered in Natalie Egberto's vehicle on October 20, 2005  
19 indicate she participated in the October 19, 2005 smuggling  
20 incident. *Id.* There is ample evidence that prison officials had  
21 "both reason and obligation to ensure the safety of the [prison]  
22 before allowing future visits [between Ricky and Natalie Egberto]  
23 to occur." *Dunn*, 621 F.3d at 1204.

24 To the extent that plaintiff Sara Smith asserts a due process  
25 violation relating to her visitation privileges at Ely State Prison  
26  
27  
28



1 in general<sup>7</sup>, defendants have not proffered a valid, rational  
2 connection between the denial of plaintiff Sara Smith's visiting  
3 privileges and prison security. Defendants contend that Ricky  
4 Egberto has a history of manipulating women into smuggling  
5 contraband and drugs into NDOC prisons. Def. Mot. Summ. J. 12-13.  
6 They also assert Sara Smith is especially vulnerable to  
7 manipulation because of her relationship to Ricky and Natalie  
8 Egberto. *Id.* at 14. These assertions, without more, are  
9 insufficient to deny Sara Smith's prison visiting privileges. Sara  
10 Smith is an independent adult. The record before the court  
11 indicates she has never been implicated in any wrong doing or  
12 involved in any incidents of smuggling at NDOC prisons. Smith Mot.  
13 Summ. J. 4. Denial of Sara Smith's prison visiting privileges is  
14 not rationally related to a legitimate penological interest.  
15 Indeed, on March 25, 2010 the court held a hearing on plaintiffs'  
16 motion for a preliminary injunction reinstating their visiting  
17 privileges. See Docket No. 40; Docket No. 116. The motion for a  
18 preliminary injunction was denied as to plaintiffs Natalie and  
19 Ricky Egberto. See Docket No. 40. It was denied without prejudice  
20 and with leave to renew as to plaintiff Sara Smith. See Docket No.  
21 116. The court directed defendants to conduct limited discovery on  
22 the issue of whether Sara Smith is prohibited from visiting the

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24 <sup>7</sup> Defendants argue that plaintiff Sara Smith's claims are specific to her  
25 visiting privileges with plaintiff Ricky Egberto. See Def. Mot. Summ. J. 14.  
26 However, as the court addressed this issue at a hearing on plaintiffs' preliminary  
27 injunction on March 25, 2010, it bears addressing here. See Docket No. 40; Docket  
28 No. 116.

1 prison facility itself. *Id.* On April 22, 2010, defendants filed a  
2 response to the court's March 25, 2010 order. (Docket #118.) The  
3 response was supported by a declaration from Warden E.K. McDaniel.  
4 In his declaration, Warden McDaniel stated that "Plaintiff Sara  
5 Smith may visit the prison facility itself if [she] is currently  
6 eligible for visitation under [NDOC] Regulations. However, if  
7 [she] is eligible for visitation ..., [she] will still be  
8 prohibited from visitation with Plaintiff Rickey Egberto due to  
9 Plaintiff Rickey Egberto's visitation status." *Id.* Thus, Sara  
10 Smith's general visiting privileges at NDOC prison facilities have  
11 been restored contingent on her being eligible under NDOC  
12 regulations. Family members do not have privileges distinct from  
13 the inmate to whom they are related. *Hill*, 628 F. Supp. 2d at  
14 1263; *Harris*, 761 F. Supp. at 412. A denial of Ricky Egberto's  
15 visiting privileges necessarily imposes a limitation on Sara  
16 Smith's visiting privileges - she may visit the prison, but until  
17 the visitation privileges of Ricky Egberto are restored, she has no  
18 constitutionally protected right to visit him.

19 Accordingly, no genuine issues of material fact remain and all  
20 plaintiffs' Fourteenth Amendment due process claims should be  
21 dismissed. Plaintiffs' motions for summary judgment on the due  
22 process issue should be denied. Defendants' motion for summary  
23 judgment on this issue should be granted.

24 *ii. Equal Protection*<sup>8</sup>

25 The Fourteenth Amendment right to equal protection survives  
26

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27 <sup>8</sup> Only plaintiffs Natalie and Ricky Egberto assert a Fourteenth Amendment  
28 equal protection claim.

1 incarceration. *Baumann v. Arizona Dep't of Corrections*, 754 F.2d  
2 841 (9th Cir. 1985). To prevail on an equal protection claim, a  
3 plaintiff must show they have a fundamental right, they were  
4 intentionally discriminated against as a member of a protected  
5 class, or the prison regulation was not reasonably related to a  
6 valid penological interest. *Lockary v. Kayfetz*, 917 F.2d 1150, 1155  
7 (9th Cir. 1990); *Turner*, 482 U.S. at 89-91.

8 Where a "plaintiff does not allege a violation of a  
9 fundamental right or the existence of a suspect classification,  
10 prison officials need only show that their policies bear a rational  
11 relationship to a legitimate penological interest in order to  
12 satisfy the equal protection clause." *Daniel*, 29 F. Supp. 2d at  
13 1188 (*citing Turner*, 482 U.S. at 89-90); *Coakley v. Murphy*, 884  
14 F.2d 1218, 1221-22 (9th Cir. 1989). A regulation or policy "neither  
15 involving fundamental rights nor proceeding along suspect lines is  
16 accorded a strong presumption of validity." *Edwards*, 2008 WL 59155  
17 \*11. Thus, "the highly deferential rational basis standard applies  
18 to any equal protection challenges to" such regulations. *Id.*

19 Prison visiting regulations rarely implicate a fundamental  
20 right. See *Edwards*, 2008 WL 59155 \*11 (family visiting regulation  
21 that required eligibility screening by corrections officer and  
22 proof of legal marriage license did not implicate equal protection  
23 principles); *Daniel*, 29 F. Supp. 2d at 1188 (restricting family  
24 visits to inmates married prior to incarceration did not implicate  
25 equal protection clause). "Neither prisoners nor visitors have a  
26 constitutional right to prison visitation." *Hill*, 628 F. Supp. 2d  
27 at 1262. "The denial of prison access to a particular visitor 'is  
28 well within the terms of confinement ordinarily contemplated by a

1 prison sentence.' ... Nor is access to a particular visitor  
2 independently protected by the" Fourteenth Amendment. *Navin v.*  
3 *Iowa Dep't of Corrections*, 843 F. Supp. 500, 504 (N.D. Iowa  
4 1994) (quoting *Hewitt v. Helms*, 459 U.S. 460, 468 (1983) and (citing  
5 *Kentucky Dep't of Corrections*, 490 U.S. at 461).

6 Further, to state an equal protection claim, plaintiffs must  
7 show they were intentionally and purposefully "treated differently  
8 [by the defendants]... because [they] belonged to a protected  
9 class." *Hill*, 628 F. Supp. 2d at 1263 (quoting *Seltzer-Bey v. Delo*,  
10 66 F.3d 961, 963 (8th Cir. 1995); see also *Sischo-Nownejad v.*  
11 *Merced Community College Dist.*, 934 F.2d 1104, 1112 (9th Cir.  
12 1991); *Draper v. Rhay*, 315 F.2d 193, 198 (9th Cir. 1963). Showing  
13 that different persons are treated differently is not enough to  
14 show a violation of equal protection. *Griffin v. County School*  
15 *Board of Prince Edward Co.*, 377 U.S. 218, 230 (1964). Prisoners  
16 are not a protected or suspect class. *Webber v. Crabtree*, 158 F.3d  
17 460, 461 (9th Cir. 1998).

18 While plaintiffs note that they are Native American and their  
19 beliefs have strong spiritual significance, they have not presented  
20 evidence that they are members of a protected class beyond this one  
21 statement. Egberto Mot. Summ. J. 14. They have presented no  
22 evidence of how this fact relates to their equal protection claims.  
23 Nor do they argue that it is the basis for any different treatment.

24 In addition, they have presented insufficient evidence that  
25 they have been intentionally treated differently from similarly  
26 situated inmates. In their motion for summary judgment, Natalie and  
27 Ricky Egberto list several allegedly similarly situated inmates  
28 whose visiting privileges were eventually restored after sanctions

1 for MJ 53 offences under AR 707. See Egberto Mot. Summ. J. 16,  
2 Exs. -PP. However, plaintiffs have not presented any evidence that  
3 (1) these inmates committed MJ 53 offences that were also connected  
4 to visitors to the prison, (2) these inmates, like Ricky Egberto,  
5 are serving life sentences for murder, (3) these inmates have  
6 extensive disciplinary records similar to Ricky Egbertos', or (4)  
7 these inmates, like Ricky Egberto, had been involved in several  
8 other smuggling incidents at Nevada prisons. *Id.* The inmates  
9 listed by plaintiffs in support of their equal protection claim are  
10 not similar to Ricky Egberto. Showing that different persons are  
11 treated differently is not enough to show a violation of the Equal  
12 Protection Clause. *Griffin*, 377 U.S. at 230.

13 Lastly, if the prison regulation is reasonably related to a  
14 legitimate penological reason, the equal protection clause has not  
15 been violated. *Daniel*, 29 F. Supp. 2d at 1188. The record before  
16 the court clearly demonstrates that plaintiff Ricky Egberto  
17 presents a serious security risk to the prison. His disciplinary  
18 history shows he regularly violates prison regulations and often  
19 involves visitors in those violations. Def. Mot. Summ. J. Exs. E,  
20 H-J. The defendants also have presented ample evidence to justify  
21 their conclusion that plaintiff Natalie Egberto is a security risk  
22 to the prison. Although the criminal charges against her were  
23 dismissed, prison records show that she was involved in the October  
24 19, 2005 smuggling incident. *Id.* at Ex. A. Contraband, drugs, and  
25 drug paraphernalia matching that found in Ricky Egberto's cell  
26 following a lengthy in-person visit with Natalie Egberto was found  
27 in her vehicle the next day. *Id.* Denying visitation between Ricky  
28 and Natalie Egberto is not an exaggerated response to the perceived

1 threat of a visitor, Natalie Egberto, introducing drugs and  
2 contraband to the prison. See *Robinson*, 841 F.2d at 1156-57.

3 Defendants' denial of plaintiff Natalie and Ricky Egberto's  
4 visiting privileges bears a valid, rational relationship to a  
5 legitimate penological interest. Accordingly, plaintiffs Natalie  
6 and Ricky Egberto's Fourteenth Amendment equal protection claims  
7 should be dismissed and their motion for summary judgment denied.<sup>9</sup>

8 C. Qualified Immunity

9 Qualified immunity shields government officials performing  
10 discretionary functions from liability for damages "insofar as  
11 their conduct does not violate clearly established statutory or  
12 constitutional rights of which a reasonable person would have  
13 known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In  
14 determining qualified immunity, the court asks: (1) whether the  
15 facts alleged, construed in the light most favorable to the injured  
16 party, establish the violation of a constitutional right, and (2)  
17 whether the right is clearly established such that a reasonable  
18 government official would have known that "his conduct was unlawful  
19 in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194,  
20 201-2 (2001). Which of these prongs is addressed first depends on  
21 the circumstances of the case at hand. The court has discretion to  
22 grant qualified immunity on the basis of one "clearly established"  
23 prong alone, without deciding in the first instance whether any  
24 right had been violated. *Pearson v. Callahan*, 129 S.Ct. 808, 818

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25  
26 <sup>9</sup> The court, having concluded that judgment should be entered in favor of the  
27 defendants on all of the plaintiffs' claims, declines to consider the issue of  
28 standing raised in the defendants' pleadings.

1 (2009); *James v. Rowlands*, 606 F.3d 646, 651 (9th Cir. 2010).

2       The basic premise is that an inmate has a "fundamental liberty  
3 interest" in "the companionship and society of his or her child" or  
4 spouse outside of prison. *Lee v. City of Los Angeles*, 250 F.3d 668,  
5 685 (9th Cir. 2001). However, rights allegedly violated "must be  
6 defined at the appropriate level of specificity before a court can  
7 determine if [they were] clearly established." *Wilson v. Layne*,  
8 526 U.S. 603, 615 (1999); *Calabretta v. Floyd*, 189 F.3d 808, 812  
9 (9th Cir. 1999) ("The right the official is alleged to have  
10 violated must have been 'clearly established' in an appropriately  
11 particularized sense."); *Dunn*, 621 F.3d at 1201. "While an ordinary  
12 father [and husband] may possess a general right to a relationship  
13 with his child" and wife, an inmate with a long disciplinary  
14 history and serving a life sentence for murder "is no ordinary  
15 parent [and husband]. He is a parent [and husband] who is lawfully  
16 incarcerated." *Dunn*, 621 F.3d at 1201. Thus, the more appropriate  
17 question to ask when deciding qualified immunity in this case is:  
18 "whether a reasonable prison official could have believed  
19 terminating [an inmate's] right to receive visits from his [child  
20 and wife] was lawful, in light of clearly established law and the  
21 information he possessed." *Id.*

22       Based on the record before the court, a reasonable  
23 correctional officer would have believed his conduct was lawful.  
24 First, the preexisting law provided the defendants with fair  
25 warning that their conduct was lawful. As cited above, precedent  
26 from the Supreme Court and the Ninth Circuit "clearly establishe[s]  
27 that prisoners do not enjoy an absolute right to receive visits  
28 while incarcerated, even from family members." *Dunn*, 621 F.3d at

1 1201; *Block*, 468 U.S. at 589; *Kentucky Department of Corrections*,  
2 490 U.S. at 461; *Overton*, 539 U.S. at 129-32. The Ninth Circuit  
3 has also declined to recognize a prisoner's constitutional right to  
4 receive contact visits. *Dunn*, 621 F.3d at 1202-3 (*citing Gerber*,  
5 291 F.3d at 621); *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir.  
6 1996); *Barnett v. Centoni*, 31 F.3d 813, 817 (9th Cir. 1994) (*per*  
7 *curiam*); *Toussaint v. McCarthy*, 801 F.2d 1080, 114 (9th Cir. 1986),  
8 *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S.  
9 472 (1995). This was the established law at the time the  
10 defendants applied the challenged regulation, AR 707, to Ricky  
11 Egberto. Thus, clearly established law supports a finding that  
12 defendants were aware their decision to suspend plaintiffs'  
13 visitation privileges was constitutional.

14 Second, the information possessed by the defendants when they  
15 restricted plaintiffs' visiting privileges reasonably justified the  
16 restriction. As outlined and discussed in detail above, both Ricky  
17 and Natalie Egberto were involved in the October 19, 2005 smuggling  
18 incident, and Ricky Egberto had an extensive prison disciplinary  
19 history. Def. Mot. Summ. J. Exs. A, E, H, J. Accordingly, they  
20 were deemed security risks. Although, Sara Smith has not been  
21 implicated in any wrong doing, her visiting privileges were  
22 reasonably restricted based on Ricky Egberto's visitation status.

23 In the context of this case, the court concludes that none of  
24 the defendants could reasonably have anticipated that their conduct  
25 in restricting the plaintiffs' visitation privileges would be found  
26 to violate the Constitution. See *Noble v. Adams*, 2011 WL 906052  
27 (9th Cir. Mar. 17, 2011). Accordingly, defendants are entitled to  
28 qualified immunity.



1 **VI. Conclusion**

2 Defendants' motion for summary judgment is granted, plaintiff  
3 Sara Smith's motion for summary judgment is denied, and plaintiffs  
4 Natalie and Ricky Egberto's motion for summary judgment is denied.

5  
6 IT IS SO ORDERED.

7 DATED: This 28th day of March, 2011.

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9  
10 UNITED STATES DISTRICT JUDGE